No. 82-69

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED[1]

May a non-employer claim the labor exemption from the antitrust laws to protect its agreement with a union and a contractor where that agreement was reached outside of the collective bargaining process and established an escrow fund to provide artificially high wage payments to union members employed by the contractor and it is asserted that the agreement was entered into with the intent to drive the contractor's competitors out of business by imposing those artificially high wages on them and to destroy the ability of the associations representing the competitors to engage in effective collective bargaining?

Must a complaint, to state a cause of action under the antitrust laws, allege that the union and each of its non-labor co-conspirators shared the same anticompetitive purpose and derived a benefit from the restraint alleged?

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[1] List of Parties—The caption of the case in this Court contains all the parties to the proceeding in the court whose judgment is sought to be reviewed. None of the Petitioners have any parent companies, subsidiaries or affiliates.

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WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 13, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, appears in the Appendix hereto (Appendix A, *infra,* pp. 1a-25a). The Memorandum

Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported and appears in the Appendix hereto (Appendix B, *infra*, pp. 26a-32a).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 13, 1982. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (15 U. S. C., § 1 *et seq.*), and the Clayton Act (15 U. S. C. § 12 *et seq.*), are set forth in Appendix F, *infra*, p. 54a.

STATEMENT OF THE CASE

1.

Jurisdiction in the Court of First Instance

The jurisdiction of the District Court was invoked under Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26.

2.

The Facts

The Petitioners are three associations (the "Associations"), which are engaged in the business of representing contractors in collective bargaining negotiations, and two contractors (the "Contractors"), which are members of the Associations (App. C, pp. 34a-36a). The Respondents are Will County Carpenters District Council and its international union (the "Union(s)"), Commonwealth Edison Company ("Commonwealth") and Gust K. Newberg Construction Co. ("Newberg") (App. C, p. 36a). The Unions are labor organizations engaged in the representation of carpenters (App. C, p. 36a). Commonwealth, a public utility, was building two large electrical generating facilities in Will County, Illinois and had contracted with Newberg for the performance of construction services at those sites (the "Commonwealth Projects") (App. C, p. 40a). This case stems from a labor dispute in Will County in 1979.

The Associations represented the Contractors and most other commercial and residential construction contractors in Will County and historically had negotiated collective bargaining agreements with the Union, which agreements have been adopted by other contractors in Will County, including Newberg (App. C, pp. 38a-39a). In 1979, however, the Associations and the Union could not agree on contract terms prior to the expiration of the existing collective bargaining

agreement (App. C, p. 39a). Shortly after the existing agreement expired, the Union directed its members to engage in selective picketing and strikes against certain contractor members of the Associations. To counteract the Union's whipsaw strategy, the Associations directed their members to engage in a defensive lockout of the Union (App. C, p. 39a). The Commonwealth Projects were also subject to the strike and lockout because Newberg, although not a member of the Associations, employed Union carpenters (App. C, p. 40a).

To induce the Union and Newberg to return to work on the Commonwealth Projects, Commonwealth instigated and negotiated an agreement (the "Escrow Agreement") with the Union and Newberg separate and apart from the then ongoing collective bargaining negotiations between the Associations and the Union (App. C, p. 41a). Pursuant to the Escrow Agreement, Newberg agreed to pay $2.25 per hour into escrow for each hour worked for it by Union carpenters during the strike (App. C, p. 42a). Commonwealth agreed to subsidize Newberg's payments (App. C, p. 42a). The Union agreed that Will County carpenters would return to work on the Commonwealth Projects despite the absence of a collective bargaining agreement (App. C, p. 43a). The Union continued to strike all contractors who refused to participate in the Escrow Agreement.

Approximately twenty-five percent of all Will County Union carpenters were employed by Newberg on the Commonwealth Projects (App. C, p. 43a). The Respondents knew and intended that the Escrow Agreement, by returning to work twenty-five percent of the Union carpenters at the artificially inflated wage level subsidized by Commonwealth, would establish, as a practical matter, a minimum level of wage increase which prevented any possibility of a lower settlement being reached in the then ongoing collective bargaining negotiations between the Union and the Associations. The President of the international union admitted "that the [E]scrow [A]greement

had tied our hands" with respect to the negotiations (App. D, p. 51a). Approximately four weeks after the Escrow Agreement was made, the Associations were forced to capitulate to the Union's demands for the "excessive and unrealistic" wage increases (App. E, p. 52a) agreed to by Respondents in the Escrow Agreement (App. C, p. 43a).

As a direct and intended consequence of the artificially high wages imposed by the Escrow Agreement, the Contractors were injured in their ability to compete in the construction market, while Newberg was insulated from the anticompetitive effects of the Escrow Agreement by Commonwealth's subsidies (App. C, p. 44a). Further, the Escrow Agreement emasculated the collective bargaining process in Will County and thereby directly injured the abilities of the Associations to engage in their respective businesses (App. C, p. 44a).

3.

The Decision of the District Court

The District Court dismissed Petitioners' Complaint on the grounds that it failed to state a cause of action, characterizing the Complaint to "allege only a direct restraint on the labor market" (App. B, p. 30a). The District Court's conclusion was premised on the fact that the alleged conspiracy was effectuated primarily through a wage agreement and that Commonwealth and Newberg allegedly derived no direct competitive benefit from the restraint. The District Court did not analyze the case in terms of the statutory and non-statutory labor exemptions from the antitrust laws.

4.

The Decision of the Court of Appeals

The Court of Appeals affirmed the District Court's decision holding that "[b]oth the statutory and non-statutory labor exemptions served to immunize [Respondents'] activities from

antitrust liability" (App. A, pp. 24a-25a). The Court of Appeals reasoned that the statutory exemption applies to collective bargaining agreements. Although the Court of Appeals recognized that the Escrow Agreement "was not, strictly speaking, a collective bargaining agreement" (App. A, p. 11a, n. 14), it considered the Escrow Agreement to be "similar to a traditional collective bargaining agreement" (App. A, p. 11a, n. 14). The Court of Appeals failed to consider how Commonwealth's participation in the Escrow Agreement affected the applicability of the labor exemption. Ruling that Petitioners' allegations rested solely upon the existence of a "collective bargaining agreement" concerning a mandatory subject of bargaining, namely wages, the Court of Appeals held that "the statutory labor antitrust exemption applies" (App. A, pp. 12a, n. 15, 14a). The Court of Appeals further stated that the Petitioners had not established a claim under a *Pennington* mode of analysis, having failed to allege that Newberg and Commonwealth "would *directly* benefit from the restraint" (App. A, p. 15a) or that the Respondents shared "a *concerted anti-competitive purpose*" (App. A, p. 16a (original emphasis)). Finally, the Court of Appeals held that the non-statutory exemption applied because "[t]he complaint alleges no more than an agreement to restrain the labor market" (App. A, p. 24a).

REASONS FOR GRANTING THE WRIT

The Decision of the Court Below Conflicts With This Court's Decisions and the Decisions of Other Courts of Appeals and Presents Questions of Substantial and Recurring Importance Regarding the Relationship Between the Labor and Antitrust Laws and Therefore Is Appropriate for Decision by This Court

The decision below seriously disrupts the careful balance established by this Court between the inherently conflicting

objectives of the antitrust and labor laws. The decision below also serves to undermine the long-standing congressional policy favoring the resolution of labor-management disputes through *bona fide* collective bargaining as set forth in the National Labor Relations Act, 29 U. S. C. 151 *et seq.* ("NLRA").

1.

The Decision Below Conflicts with Decisions of This Court and Numerous Courts of Appeals and Impermissibly Expands the Scope of the Labor Exemptions

Contrary to the decision of the court below, the Escrow Agreement is not exempt from the antitrust laws by virtue of either the statutory or non-statutory labor exemptions. The statutory exemption applies only to unilateral union activity and can only be asserted by unions. As the court in *Snyder Company* v. *ASC*, 677 F. 2d 1111, 1118, n. 10 (6th Cir. 1982), stated:

> "Th[e] [statutory] exemption can only be asserted by a labor organization itself and will be lost if the union combines or conspires with a non-union group to restrain trade. See, e.g., Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797 (1945) .... Because defendants in the present case are not labor organizations, they could not assert the statutory exemption." [Other citations omitted.]

Since Commonwealth and Newberg, both of which are non-labor entities, were parties to the Escrow Agreement, the statutory exemption is inapplicable. By ruling that the statutory labor exemption applies to a combination of labor and non-labor entities, the decision of the court below conflicts with the uniform rulings of this Court and every other court that has interpreted the scope of the statutory labor exemption. *See, Connell Construction Co.* v. *Plumbers and Steamfitters Local*

100, 421 U. S. 616, *reh. denied*, 423 U. S. 884 (1975); *see also, e.g., California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527 (9th Cir. 1980), *cert. granted*, ____ U. S. ____, 102 S. Ct. 998 (1982); *Mackey* v. *National Football League*, 543 F. 2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801 (1977).

The non-statutory exemption was created by the courts to exempt *bona fide* collective bargaining agreements between unions and employers, the anticompetitive effects of which are consistent with national labor policy. Such agreements are exempt "as a proper accommodation between congressional policy favoring collective bargaining under The NLRA and the congressional policy favoring free competition in business markets. . ." *Connell, supra* at 622. Employers as well as labor organizations may invoke the non-statutory exemption but only with respect to *bona fide* collective bargaining agreements negotiated in good faith in accordance with the NLRA. *See, Allen Bradley Co.* v. *Local 3, IBEW*, 325 U. S. 797, *reh. denied*, 326 U. S. 803 (1945); *Larry K. Muko, Inc.* v. *Southwestern Pennsylvania Trades Council*, 609 F. 2d 1368 (3d Cir. 1978); *Altemose Construction Co.* v. *Atlantic, Cape May, etc.*, 493 F. Supp. 1181 (D. N. J. 1980).

However, Commonwealth, which negotiated the terms of the Escrow Agreement, employed no carpenters and was thus an utter stranger to the collective bargaining relationship between union and employer. Therefore, the Escrow Agreement was not and could not be a *bona fide* collective bargaining agreement. The court below itself recognized that the Escrow Agreement "was not, strictly speaking, a collective bargaining agreement" (App. A, p. 11a, n. 14). Nor did any of the Respondents view the Escrow Agreement as a legitimate collective bargaining agreement between union and employer. Rather, the Union conceded that "both Newberg and Edison were valuable pawns" with whom it could conspire to impose the

terms of the Escrow Agreement on all Will County carpenters.[2] Furthermore, the Respondents agreed that if they were unsuccessful in imposing the terms of the Escrow Agreement, they would be bound by the terms of the collective bargaining agreements ultimately negotiated between the Union and the Associations (App. A, p. 3a, n. 2).

Connell and cases decided subsequent to it make clear that the existence of a collective bargaining relationship is a condition precedent of the availability of the non-statutory labor exemption. The court below totally ignored this crucial requirement. In *Woelke & Romero Framing* v. *NLRB*, ____ U. S. ____, 110 LRRM 2377 (1982), this Court ruled that a restrictive subcontracting agreement between a union and an employer in the construction industry was lawful because it was negotiated in the context of a collective bargaining relationship. *See also, Donald Schriver* v. *NLRB*, 635 F. 2d 859 (D.C. Cir. 1980), *cert. denied*, 451 U. S. 976 (1981). In *Connell* a similar restrictive agreement having the same effect on competition was found to be outside the ambit of the labor exemption precisely because it was *not* the product of collective bargaining. Commonwealth, like Connell, employed no members of the conspiring union and thus could not have a legitimate collective bargaining relationship which could have immunized the anticompetitive effects of the Escrow Agreement.

The non-statutory labor exemption from the antitrust laws is predicated upon the assumption that management and labor will wield their economic power solely within the confines of the collective bargaining process. In *Connell*, this Court found the anticompetitive agreement between the union and Connell

[2] On p. 11 of its brief filed with the Seventh Circuit Court of Appeals, Will County Carpenters District Council argued: "Each side [*i.e.*, the Union and the Associations] wanted merely the best deal possible and both Newberg and Edison were valuable pawns directly interested in the dispute."

unlawful because it permitted the union to exert unlimited "top-down" organizational pressure through Connell outside of a collective bargaining relationship. *See also, Pacific Northwest Chapter of the Associated General Contractors, Inc.* v. *NLRB*, 659 F.2d 1301 (9th Cir. 1981), *aff'd in part and vacated in part*, ____ U.S. ____, 110 LRRM 2377 (1982). Commonwealth's agreement to make available its prodigious economic resources to subsidize Respondents' combination devastated the Associations' ability to engage in effective collective bargaining because the Associations could not exert any countervailing economic pressure upon Commonwealth since it was outside of the collective bargaining relationship between the Union and the Associations. Commonwealth's instigation and funding of the Escrow Agreement radically altered in favor of the Union the normal balance of power which governs the collective bargaining process and effectively precluded the Associations from negotiating terms different from those contained in the Escrow Agreement. Thus, the level of carpentry wages was not established through the "give and take" of collective bargaining where the respective economic strengths of union and employer determine the outcome. Rather, the wage level was established and imposed upon all Will County contractors pursuant to the Respondents' conspiracy. It would be an anomaly to permit Commonwealth to invoke an exemption based upon the national policy of favoring collective bargaining to shield conduct that was intended and, in fact, did frustrate that process.

To preserve the stability and integrity of the collective bargaining process, this Court should reaffirm that the statutory labor exemption applies only to labor organizations engaged in unilateral activity and that the non-statutory exemption applies only to *bona fide* collective bargaining agreements between employers and labor organizations, the anticompetitive effects of which are consistent with national labor policy.

2.

The Decision Below Improperly Required Plaintiffs to Allege that Each Party to an Agreement Having Anticompetitive Effects Shared the Same Anticompetitive Purpose and Directly Benefited Thereby

The decision below requires a plaintiff in a labor-antitrust case to plead that each conspirator shared a predatory intent to injure competition so that each of the non-labor conspirators directly benefited thereby. The decision misinterprets *UMW* v. *Pennington*, 381 U. S. 657 (1965), and immunizes from the antitrust laws conduct which is clearly anticompetitive and inconsistent with national labor policy.

A review of *Pennington* clearly demonstrates the unlawful character of the Escrow Agreement because the intended and actual effects of the Escrow Agreement preclude reliance upon the labor exemption even if the Escrow Agreement had been made in the collective bargaining context. In *Pennington*, the Court found forfeiture of the labor exemption where the union and certain large mine operators conspired to impose a high wage scale on small operators with the intent to drive them out of business. The Court pointed out that combinations between employers and unions have been found unlawful "without regard to whether they found expression in a collective bargaining agreement . . . and even though the mechanism for effectuating the purpose of the combination was an agreement on wages." *Id.* at 662-63 (Citations omitted). In *Pennington*, the union's purpose in entering the unlawful wage agreement was not to injure small operators or otherwise restrain trade, but to increase the wages paid to its members. Thus, the union's goal was lawful, but the means it chose, a conspiracy with non-labor entities to favor certain operators over others, violated the antitrust laws.

The instant case presents a more complex factual situation than *Pennington* because of the involvement of

Commonwealth, a non-labor, non-employer entity. Respondents conspired by means of the Escrow Agreement to establish, and impose upon contractors in Will County, a ruinously high level of construction costs, with the intent to favor Newberg and injure the contractors in their respective abilities to compete in the construction industry and to destroy the abilities of the Associations to engage in effective collective bargaining. Commonwealth agreed to subsidize the scheme with the knowledge, shared by all the Respondents, that the Escrow Agreement would cause some of Newberg's competitors to be driven out of business (App. E, p. 53a).[3] Unlike Newberg, Commonwealth did not derive a competitive benefit from the restraint. As a public utility monopoly, Commonwealth by definition has no competitors. However, it cannot seriously be contended that Commonwealth's participation immunizes an agreement which otherwise would be unlawful. Respondents' conduct is clearly anticompetitive and is exactly the type of conduct found subject to antitrust scrutiny in *Pennington* and cases decided subsequent to it. Therefore, to impose antitrust liability on Respondents would further both the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets.

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[3] In *Snyder Company* v. *ASC*, 677 F. 2d 1111 (6th Cir. 1982), the court held that where a union and employer conspire to impose a wage scale on non-signatory employers "with conscious knowledge or intent that it would be used to drive competitors out of business . . . then a violation of the antitrust laws has occurred." *Id.* at 1119, quoting *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F. 2d 767, 782 (6th Cir. 1970), *cert. denied*, 402 U. S. 983 (1971).

CONCLUSION

The practical effect of the decision below is to permit non-labor, non-employer entities, such as Commonwealth, which have merely a financial interest in the resolution of a labor dispute to intervene in that dispute to protect their interests at the expense of the collective bargaining process. Thus, the decision allows a purchaser of construction services who believes that the short-term costs of a work stoppage exceed the price then being demanded by a striking union in its negotiations with the actual employers of the union's members to circumvent the collective bargaining process by negotiating directly with the union and favored employers to subsidize a wage agreement which will end the work stoppage and permit the union and favored employers to impose those wages upon the disfavored employers with the intent and effect of driving some of them out of business and to destroy the ability of the associations representing those disfavored employers from engaging in effective collective bargaining.[4] The unprecedented intrusion by Commonwealth, a non-labor, non-employer entity, into an existing collective bargaining relationship is totally inconsistent with the concept of arms-length, good faith bargaining between the Associations and Union and is antithetical to the national policy of encouraging collective bargaining, which policy has served as the basis for the judicially created non-statutory labor exemption from the antitrust laws. Since neither the statutory nor the non-statutory labor exemption is applicable to this kind of combination between labor and non-labor entities, Respondents' conduct is properly subject to antitrust scrutiny.

[4] The issues presented by this petition are of recurring importance because of the tendancy for any developer of a large project, such as a power plant, airport, major office building, etc., faced with a work stoppage, to contemplate protecting its short term financial interests by subverting the collective bargaining process in a manner similar to that employed by Commonwealth.

Petitioners submit that the issues raised by this petition are of signal importance and warrant resolution by this Court. The decision below impermissibly broadens the scope and availability of the labor exemptions while unduly narrowing the circumstances under which a plaintiff may assert a cause of action against a combination of labor and non-labor entities under the antitrust laws, all of which is clearly contrary to the decisions of this Court and numerous Courts of Appeals.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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